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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 75-383

CITY OF LOUISVILLE
FRANK W. BURKE
GEORGE BURTON
COL. C. J. HYDE
LT. ELMER JOHNSON
PATROLMAN WALTER MEDLEY - - Petitioners

versus

MARJORIE GLASSON - - - - Respondent

PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

CITY OF LOUISVILLE
FRANK W. BURKE
GEORGE BURTON
COL. C. J. HYDE
LT. ELMER JOHNSON
PATROLMAN WALTER MEDLEY - - *Petitioners*

v.

MARJORIE GLASSON - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 13, 1975.

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals reversed the judgment of the United States District Court for the Western District of Kentucky, in holding that when the Petitioner, Officer Medley, destroyed

the Respondent's poster she was engaged in activity protected by the First and Fourteenth Amendments; and that such action was unreasonable and not taken in good faith. Furthermore, the Court ruled that Petitioners' actions violated Respondent's constitutional rights, and that such actions were undertaken pursuant to an impermissably invidious discrimination remedial under 42 U.S.C. §1985(3). The Court of Appeals further held that the findings of the District Court as to good faith and discriminatory intent were not subject to the "clearly erroneous rule" of Fed. R. Civ. P. 52(a).

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 13, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I.

Did the Court of Appeals below err in reversing the judgment of the District Court below and in holding that the trial court's findings were not subject to the requirements of the "clearly erroneous rule" of Fed. R. Civ. P. 52(a)?

II.

Did the Court of Appeals below err in reversing the judgment of the District Court below and in holding that Petitioners acted unreasonably and not in good faith and that their actions were pursuant to an impermissably invidious discriminatory intent?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment XIV, Section 1

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATUTES INVOLVED

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. Section 1985

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully

qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Fed. Rules Civ. Proc., Rule 52(a), 28 U.S.C.

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

Fed. Rules Civ. Proc., Rule 56(c), 28 U.S.C.

". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ."

STATEMENT OF THE CASE

The Respondent, Marjorie Glasson, filed suit on July 13, 1971, in the United States District Court for the Western District of Kentucky, under Title 28 U.S.C. Sections 1331 and 1343, and under Title 42 U.S.C. Sections 1983 and 1985. Respondent instituted this action against Petitioners for compensatory and punitive damages which she alleged were a result of a violation, by Petitioners, acting under color of state law, of her civil rights in general and violation of her rights of association, assembly, speech and the right to petition her government for a redress of grievances guaranteed her under the First Amendment to the Constitution of the United States. Respondent simultaneously alleged a violation of her right to the equal protection of the laws guaranteed under the Fourteenth Amendment. Respondent further alleged that in doing the acts complained of Petitioners were conspirators engaged in a scheme to deprive Respondent of her constitutional rights and particularly those hereinabove enumerated.

Respondent's suit was brought against the Petitioners, City of Louisville, Frank W. Burke, then Mayor of the City of Louisville, George Burton, then Director of Safety of the City of Louisville, Col. C. J. Hyde, then Chief of Police of the Louisville Police Department (since retired), Lt. Elmer Johnson and Patrolman Walter Medley, members of the Louisville Police Department both at the time Respondent's claim arose and presently.

In her brief to the United States Court of Appeals for the Sixth Circuit, Respondent conceded that she had no claim against the City of Louisville and stated that she did not wish to pursue her claims against Frank W. Burke and George Burton.

On July 14, 1970, the former President of the United States, Richard M. Nixon, came to visit the City of Louisville. Petitioners were members of the Louisville Police Department, working in coordination with the F.B.I. and the Secret Service, to provide security and protection of the President and the crowd of onlookers as the presidential motorcade passed.

On this day, Respondent was bearing a placard which she alleged and testified read: "Lead us to hate and kill poverty, disease and ignorance—not each other." Petitioners gave conflicting testimony that the message contained the word "Murderer" at the top of the sign in larger and bolder letters.

Petitioners, Johnson and Medley, assigned to duty to protect the President, were patrolling their area which included the intersection of Fourth Street and Guthrie, where Respondent was standing. It was their duty to observe the people and to be alert for any activity within the crowd which would create a disturbance or cause confusion or such conduct that could interfere with the progress of the motorcade, which could jeopardize the safety of the President, or otherwise be hazardous to others in the crowd, composed of onlookers.

The District Court, in its Finding of Fact, accepted the testimony of Petitioners that as the presi-

dential motorcade approached the area adjacent to the point at which Respondent was standing, Fourth and Guthrie, Petitioner—Medley noticed a commotion in the crowd across the street and persons pointing and calling across the street directing attention to the sign being held by Respondent.

Petitioner Medley, after reading the sign, crossed the street and entered into a discussion with his superior, Petitioner Johnson, concerning the contents and effect of the message. It was determined by them that the message was inflamatory and was, in their judgment, creating rancor and resentment in the crowd which could impede the progress of the motorcade and jeopardize the safety of the President, other members of the motorcade and the onlookers in the crowd.

Petitioner Johnson directed Petitioner Medley to go to Respondent and request that she take down the sign; and if she would not voluntarily do so, Petitioner was to take it from her in order to eliminate the hazard. Petitioner Medley approached Respondent and requested that she take down the sign, and upon her refusal to do so, he removed it from her and destroyed it.

The District Court dismissed the Complaint against the Petitioner, City of Louisville, it not being a person under the statute. On March 5, 1973, the case was tried to the court without a jury. At the conclusion of the testimony, the District Court dismissed the suit at Respondent's expense and Judgment for Petitioners was entered. The District Court, entering its Findings of Fact and Conclusion of Law on March 28, 1973, found that Petitioners Johnson and Medley, upon observing

a commotion stirring in the crowd caused by Respondent's sign, acted in good faith and upon reasonable grounds, and that their decision and action in removing the sign from Respondent and destroying it were within the ambit of permissible discretion as it appeared at the time, considering the imminent arrival of the President. As to the 42 U.S.C. 1985(3) claim, the District Court found no evidence of "class based invidious discriminatory animus" as required to be an element of the cause of action.

Subsequently, Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On June 13, 1975, the Court of Appeals reversed the District Court's judgment and remanded the case for further proceedings. In so doing, the Court of Appeals held that the District Court had erred in entering judgment for Petitioners holding that the Petitioners acted in bad faith and with an impermissible discriminatory animus.

It is from the judgment of the Court of Appeals below that Petitioners make application for a Writ of Certiorari.

REASON FOR GRANTING THE WRIT

I.

This Court Should Grant Certiorari to Consider Whether the Court of Appeals Below Erred in Reversing the Judgment of the District Court Below and in Holding That Whether Petitioners Acted in Good Faith and Without an Invidious Discriminatory Intent Was an "Ultimate Finding" and Therefore Not Subject to the "Clearly Erroneous Rule" of Fed. R. Civ. P. 52(a).

The judgment of the District Court that Petitioners acted reasonably and in good faith and without discriminatory intent was, in that regard, a finding of fact, and not a finding of law.

However, in reaching this issue the Court of Appeals held:

> "Although generally findings of fact by a trial court must be accepted by an appellate court unless they are clearly erroneous, F. R. Civ. P. 52(b), (*sic*), determinations, whether called ultimate findings or conclusions of law, that attach legal significance to historical facts may be reversed if upon examination of the record they are found to be erroneous." (Appendix B, p. 36)

In the leading case establishing that a good faith defense exists for law enforcement officers in actions under §1983, *Pierson* v. *Ray,* 386 U. S. 547, 18 L. Ed. 2d 84, 288 S. Ct. 1213 (1967), this Court stated that the question whether law enforcement officers act in good faith is a jury question. In *Pierson, supra,* petitioners were arrested by municipal police officers on

charges of having violated the Mississippi breach-of-peace statute as they attempted to use segregated facilities at an interstate bus terminal. At trial on a §1983 action, petitioners and respondent police officers presented conflicting evidence whether a crowd had gathered at the bus terminal and whether imminent violence was likely. In regard to whether arrests made by the respondents under such alleged circumstances were made in good faith, this Court stated:

> "(The officers) testified in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional then a verdict for the officers would follow even though the arrest was in fact unconstitutional." 386 U. S., at 557.

Under facts strikingly similar to those now before the Court, this Court stated that the question of good faith as a defense to a §1983 action is a question for the finder of fact.

It is beyond dispute that, "To draw a distinction between fact and law is difficult if not impossible to make at times." 5 Moore's Federal Practice, 2d Ed., Sec. 52.05(1), pp. 2689-2690.

In attempting to distinguish between the two, Professor Moore states that illustrative cases will aid in such determination and chooses as his first illustrative case *Plack* v. *Baumer*, 121 F. 2d 676 (3rd Cir. 1941). In this case the court affirmed the judgment of the trial

court sitting without a jury and held that a finding of defendant's good faith in a conversion action was a finding of fact. Professor Moore quotes *Plack* at 121 F. 2d 679,

> ". . . What the court found was that, if the defendant dealt with the collateral in a manner violative of plaintiff's rights as owner, it did so innocently and in good faith, and with no intent to ignore the owner's rights. And that, of course, is a finding of fact."

In Civil Rights cases, the courts consistently have found the issue of a defendant's good faith to be an issue of fact.

In *Sparrow* v. *Goodman,* 361 F. Supp. 566 (1973), a class action brought against law enforcement officers, inter alia, for infringement of plaintiffs' rights to freedom of speech, to peacefully assemble and to petition for redress of grievances, the court denied defendant's motion for summary judgment and dismissal based upon good faith defenses, and held:

> "The existence of their good faith, the absence of an illegal motive (such as suppression of dissent) and the reasonableness of the belief of the Secret Service and other law enforcement officials are questions of fact . . ."

The court ordered that the case would stand for trial upon those and other issues.

Likewise in *Ames* v. *Varveck,* 356 F. Supp. 931 (1973), involving a §1983 action, the court, citing *Pierson, supra,* denied defendant's motions for dis-

missal and summary judgment based upon good faith defenses because the question of good faith was found to be a question not of law but of fact. "Because of the factual nature of defendant police officers' defense, neither dismissal nor summary judgment can be granted." 356 F. Supp. at 938.

Petitioners respectfully submit that if a good faith defense presents a genuine issue as to a material fact for the purposes of 28 U.S.C. Rule 56, a finding upon such a defense constitutes a finding of fact for the purposes of 28 U.S.C. Rule 52(a) and that accordingly such a finding cannot be set aside unless clearly erroneous.

Failure to examine the record within the restraints of the proper test was serious, prejudicial error. The present case, as was *Pierson,* is essentially an inquiry into motive and intent. This is inherently a subjective inquiry, although certain objective standards of reasonableness must be applied. To conduct such an inquiry on the basis of a mere transcript is to ignore the most valuable technique of all—observance of the demeanor of the witness as he testifies. It is for this reason that this Court has stated that "good faith" in a §1983 context is a jury question. In *Rodriguez* v. *Jones,* 473 F. 2d 599 (5th Cir. 1973), the Fifth Circuit applied the clearly erroneous standard to the findings of the District Court in a civil rights action arising out of an alleged illegal entry. The Court states:

> "We are unable to say these findings are clearly erroneous . . . *credibility choices and the reso-*

lution of conflicting testimony are within the province of the court sitting without a jury, subject only to the clearly erroneous rule of Fed. R. Civ. P. 52(a).". 473 F. 2d, at 604. (Emphasis added.)

Even the Sixth Circuit has applied the clearly erroneous test to a finding of good faith in a §1983 action. In *Smith* v. *Ross,* 482 F. 2d 33 (6th Cir. 1973), a civil rights action was brought against a deputy sheriff and others by members of an interracial band. The District Court found that the deputy acted in good faith and the Court of Appeals affirmed because "the facts as found by the district court support its judgment", and "are not clearly erroneous, Fed. R. Civ. P. 52(a)". 482 F. 2d, at 37, at 36. It is difficult to reconcile *Smith, supra,* with the present case.

The only cases cited by the Court of Appeals to support its contention that the clearly erroneous rule is inapplicable are Sixth Circuit cases. The principle case is *Cordovan Associates, Inc.* v. *Dayton Rubber Co.,* 290 F. 2d 858 (6th Cir. 1961), where the issue was interpretation of a written contract. The Petitioners have no argument with the holding expressed therein:

> "The interpretation and construction of a written contract are matters of law within the competence of the Court of Appeals to review and do not come under the clearly erroneous rule." 290 F. 2d, at 860.

The rationale is that a reviewing court is equally competent to review written evidence. However, this

rationale does *not* apply to instances where credibility is central to the issue at hand.

In dealing with mixed questions of law and fact, findings are not binding on reviewing courts when an incorrect principle of law has been applied to the facts. *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 396, 68 S. Ct. 525, 92 L. Ed. 746 (1948); 5a Moore's Federal Practice, 2d Ed., Sec. 52.03(2), pg. 2664. This is not the case before us. The District Court and the Court of Appeals are in agreement as to the propriety of a good faith defense in §1983 actions.

Finally, this Court should grant certiorari to reconcile the conflict between the Fifth and Sixth Circuits. In *Rodriguez, supra,* and *Anderson* v. *Nosser,* 438 F. 2d 183 (5th Cir. 1971), the Fifth Circuit correctly labeled the *Pierson* good faith defense as a question of fact for jury consideration. The Court stated:

> "The Pierson test is a subjective one, which of necessity raises questions of credibility, usually within the province of the jury. Here there was testimony from Robinson that he believed he was doing his duty as a peace officer in arresting plaintiffs . . .
>
> We therefore think that there was sufficient evidence to raise an issue of the Pierson defense. The court below submitted this issue under the proper instructions, and we are thus bound by the jury determination of no liability." 438 F. 2d, at 195.

Petitioners respectfully submit that the Court of Appeals erred in refusing to limit their inquiry pursuant to Fed. R. Civ. P. 52(a).

II.

This Court Should Grant Certiorari to Consider Whether the Court of Appeals Below Erred in Reversing the Judgment of the District Court Below and in Holding That the District Court's Finding That Petitioners Acted Reasonably and in Good Faith and Without an Invidious Discriminatory Intent Was Erroneous.

The judgment of the District Court that the Petitioners acted reasonably and in good faith and without an invidious discriminatory intent was not clearly erroneous. Federal Rule of Civil Procedure 52(a) states in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In the present case the Court of Appeals has failed to give due weight to the superior position of the District Court in weighing the conflicting testimony. In *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969), this Court stated:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." 395 U.S., at 123.

It is clear from the record, and Judge Gordon states that "there is, of course, considerable conflict in the evidence" (App. A, pg. 28). Under such circumstances, the trial judge is faced with a clear choice between opposing perspectives. In view of the importance of the credibility of opposing witnesses such a choice cannot be deemed clearly erroneous. In *United States of America* v. *Yellow Cab Company,* 338 U. S. 338, 67 S. Ct. 1560, 94 L. Ed. 150 (1949), this Court has stated:

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'." 338 U. S., at 342.

Likewise, this Court has recognized the overwhelming importance of witness credibility in the determination of motive, which is essential to the affirmative defenses of good faith and lack of discriminatory intent:

> "Findings as to the design, motive, and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." 338 U. S., at 341.

The inferences drawn by the District Court from the testimony are supported by the evidence. Such in-

ferences are similarly protected by Fed. R. Civ. P. 52 from undue inquiry.

> "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed. The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witnesses. The District Court heard the witnesses, and was the proper judge of their credibility." *Walling* v. *General Industries Co.,* 330 U. S. 543, 550, 67 S. Ct. 883, 91 L. Ed. 1088 (1947).

The present case presents special problems upon review. The sole substantive issue on appeal deals with the inherently subjective inquiry into the intent of the Petitioners. The determination of good faith or discriminatory intent solely from the transcript of the proceedings must be considered with suspicion, at best.

> "With the testimony still fresh in mind, the District Judge has stated his impressions of the credibility of the witnesses who appeared before him. His judgment of the witnesses, given before the passage of time had dimmed the memory of what can never be adequately preserved by a stenographic record, is thus entitled to great weight." *Mazzella Blasting Mat Co.,* v. *Vitiella,* 250 F. 2d 935, 935 (2nd Cir. 1957).

See also: *United States* v. *Oregon Medical Society,* 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 778 (1951).

It must be remembered that the issue on appeal is not whether Respondent was engaged in protected speech. The issue is whether the Petitioners, *in good faith,* believed it necessary to remove her sign from the view of an increasingly hostile audience *to insure the protection of the President of the United States.* Such an inquiry must focus, to a great extent, upon the testimony of the Petitioners.

The right of a defendant in an action arising out of 42 U.S.C. §1983 to establish good faith as a defense is beyond question. *Pierson* v. *Ray, supra.* The rationale for such a defense antedates *Pierson.* Judge Learned Hand stated that the purpose of such immunities (or quasi-immunities) is to encourage conscientious public officials by not "exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2nd Cir. 1949). The Sixth Circuit has recognized this principle as applied to police officers.

> "No one has a constitutional right to be free from a law officer's honest misunderstanding of law or facts in making arrest." *Gabbard* v. *Rose,* 359 F. 2d 182, 185 (6th Cir. 1966); quoting *Agnew* v. *City of Compton,* 239 F. 2d 226 (9th Cir. 1957).

A similar standard has been applied in cases involving First Amendment rights. *Adamian* v. *University of Nevada,* 359 F. Supp. 825 (1973); *O'Brien* v. *Gallo-*

way, 362 F. Supp. 901 (1973); *Pocket Books, Inc.* v. *Walsh,* 204 F. Supp. 294 (1962). *Handverger* v. *Harvill,* 479 F. 2d 513 (9th Cir. 1973), is a §1983 case set in a First Amendment context. The defendant university officials were in a dilemma over whether to stop a "commencement" by anti-war activists and possibly abridge the group's constitutional rights or permit the activity which they had been advised by counsel was *probably* illegal. In holding that all the defendants acted in good faith the Court emphasized the uncertain nature of regulation of free speech. In analyzing their right to suppress the free expression of ideas the defendants had time to reflect in the quiet of their offices; and they had the advice of their legal counsel and two assistants from the Attorney General's office. How different the present case is! Here Petitioners were in a disturbing situation, requiring an immediate decision, involving a question of constitutional dimensions upon which even learned judges have disagreed, with the protection of the President as their responsibility. Although dealing with a warrantless arrest, the words of *Hill* v. *Rowland,* 474 F. 2d 1374, 1378 (4th Cir. 1973), are meaningful:

> "As stated in *Whirl* v. *Kern,* 407 F. 2d 781 at 790 (5 Cir. 1969), 'An arrest is often a stressful and unstable situation calling for discretion, speed, and on-the-spot evaluation.' To require the police officer, under penalty of personal liability for damages if he is in error, to make on-the-spot complex and intricate legal determinations of the existence or absence of probable cause under the Fourth

> and Fourteenth Amendments when the courts, acting in a more leisurely and relaxed atmosphere, have difficulty in making these decisions is to place the policeman in just such a position of acting at his peril as was declared to be intolerable in *Pierson* v. *Ray, supra,* 386 U. S. at 555, 87 S. Ct. at 1218."

Police officers are given training in arrest procedures, they are not given training in constitutional questions of free expression. This fact makes the Court of Appeals' decision that the Petitioners acted in bad faith gravely suspect, especially in view of the fact that *they never heard them testify.* The basis used for testing the actions of the Petitioners as to the issue of a violation of free speech must be a reasonable one under the circumstances and cannot be viewed from the lofty height of hindsight or in the detached atmosphere of judicial chambers. There is no doubt that an unruly crowd could threaten the safety of the President. This is underscored in importance by the tragic assassinations in recent years. The pressure of a wrong decision in such a stressful situation is evidence of good faith, in and of, itself. This Court pointed out the stress of such a dilemma in *Pierson, supra:*

> "A policeman's lot is no so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted (*sic*) in damages if he does." 386 U. S. at 555.

The most recent case discussing the good faith defense to §1983 actions is *Wood* v. *Strickland,* 420 U. S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975), which dealt with the liability of school board members for an alleged denial of due process. It is Petitioner's contention that their actions were reasonable in light of the demands of the situation. The District Court so found. This finding is consistent with the rationale for the good faith defense as expressed in *Wood, supra:*

> "The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure . . .
>
> the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." 420 U. S., at 429.

The Court of Appeals quotes sections of this opinion in support of the proposition that the determination of good faith in a §1983 context requires a "knowledge of basic, unquestioned constitutional rights."

While Petitioners readily admit it is not unreasonable to expect police officers to be aware of basic constitutional rights, this is an oversimplification which sheds little light upon the case at bar. First, this incident took place in the "urgency of a street confrontation" and not in the "contemplative atmosphere" of a school board meeting with ready access to legal counsel to explain matters of constitutional rights. Secondly, the interrelationship of street demonstrations involving the President of the United States and First Amendment freedoms can hardly be described as a "basic, unquestioned constitutional right."

In a recent decision reflecting on this question the Fifth Circuit in *Sapp* v. *Renfroe,* 511 F. 2d 172 (5th Cir. 1975) applied the *Wood, supra,* standard to a question dealing with First Amendment freedoms. The Court held that a student's freedom from attending ROTC was not a clearly established constitutional right. Certainly, if a school board is given such leeway in determining such constitutional questions, a police officer acting in a turbulent situation deserves that much more. The question facing the officers in the present case cannot be said to have been more "basic" than that facing the school board in *Sapp, supra.*

Finally, turning to the holding of the Court of Appeals that the Petitioners acted with an invidious discriminatory intent, we are bound by the same considerations as mentioned above regarding the questions of reasonableness and good faith.

The principle case dealing with claims under 42 U.S.C. §1985(3) is *Griffin* v. *Breckinridge,* 403 U. S.

88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971). This Court delineated the requisites of the cause of action:

> "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U. S., at 102.

Judge Gordon in his opinion in the District Court held that "we find no evidence of 'class-based invidiously discriminatory animus' as required in *Griffin, supra.*" The Court of Appeals reversed, holding that the actions of the police in confiscating and destroying the placard were indeed motivated by invidiously discriminatory animus and therefore the petitioners were in violation of §1985(3).

Again, the findings of the trial court were not clearly erroneous. Fed. R. Civ. P. 52(a). The trial transcript is replete with testimony, the gist of which is that the officers acted only to prevent the proliferation of violence immediately preceding the passing of the Presidential motorcade, and that the officers took and destroyed the placard *ONLY AFTER* the officers perceived a dangerous situation developing.

On Page 66 of the trial transcript Officer Medley was asked:

> "Q. . . . (W)hy did you think it was so imperative that you had to take that sign away from her?
> A. My job was to—protecting the President and to keep the crowd at ease and the crowd was

> becoming unruly and I had to get that sign down or the crowd would have become boisterous and maybe hurt the young lady."

Medley's superior officer, Sgt. Johnson, responding to a query regarding the orders given relating to "signs carried by persons" declared:

> "A. They said if signs were of the nature that created disturbances, uh, that to be interested in the President's welfare . . . (and) ask them to remove the signs" (T. 74).

The signs that were not to be permitted, Johnson continued, were signs that would "cause unreasonable reaction of a crowd . . . signs that would cause unreasonable trouble and disorder." (T. 75).

The Court of Appeals erred in stating that "the record is unmistakably clear that (petitioners) intended to permit no criticism of the president that day." When asked whether he would have included signs which were merely "against" the President as examples of the category of "detrimental" signs, Sgt. Johnson replied negatively (T. 75) that he would be concerned exclusively with signs that could "cause danger to the President or anyone else present" (T. 76). Further, Chief of Police Hyde in responding to the question whether any special instructions were given the officers concerning signs, answered:

> "A. . . . the people who carried signs peaceably without causing trouble or inciting people or provoking people, but as long as they were peaceable; the signs didn't have any profanity or obscenity in

them that there would be no—uh, there would be no reason to take any action against those people." (T. 98).

From the above, it is clear that the finding of the District Court that the Petitioners lacked any invidiously discriminatory animus was supported by substantial evidence. We respectfully submit the Court of Appeals is in error.

CONCLUSION

It is respectfully submitted that this Court should grant certiorari to review the erroneous judgment of the Court of Appeals below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 6999

MARJORIE GLASSON - - - - - - - *Plaintiff*

v.

CITY OF LOUISVILLE, FRANK W. BURKE, GEORGE BURTON, COL. C. J. HYDE, LT. ELMER JOHNSON, and PATROLMAN WALTER MEDLEY - *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon joint motion of the parties and their respective counsel, the above entitled action came on for trial before the Court, Honorable James F. Gordon, United States District Judge, presiding, without a jury, the plaintiff appearing in person and by her attorneys, Philip L. Grauman and Thomas L. Hogan; and the defendants appearing in person and by their attorneys, Frank A. Logan and Herbert Van Arsdale, and testimony having been offered and arguments of counsel made, and the Court having been duly advised, now makes and files its findings of fact and conclusions of law.

FINDINGS OF FACT

The defendant, Frank W. Burke, was Mayor of the City of Louisville; George Burton was the Director of Safety; and the defendants Colonel C. J. Hyde, Lt. Elmer Johnson

(then Sergeant) and Patrolman Walter Medley were members of the Police Force of the City of Louisville at the time the acts were alleged to have occurred in the complaint.

Though there is, of course, considerable conflict in the evidence, we find that on the occasion of President Nixon's visit to the City of Louisville, Kentucky, on July 14, 1970, the plaintiff, Marjorie Glasson, a white woman, was standing at Fourth and Guthrie Streets with a placard bearing a message prepared by her, to be read by President Nixon as he passed in his motorcade on that date and occasion.

The plaintiff testified that the message contained on the sign was "Lead us to hate and kill poverty, disease and ignorance, not each other." The defendants, Sgt. Johnson and Patrolman Medley, testified that the message contained the word "murderer" at the top of the sign in larger and bolder letters.

The defendants, Sgt. Johnson and Patrolman Medley, were assigned to duty to secure the safety and protection of the President. Their area of patrol covered Fourth Street at Guthrie. It was their duty to observe the people, to be alert for any activity within the crowd which would create a disturbance or cause confusion or such conduct that could interfere with the progress of the motorcade, which could jeopardize the safety of the President, or otherwise be hazardous to others in the crowd composed of onlookers.

As President Nixon's motorcade approached the area adjacent to the point at which the plaintiff was standing, Fourth and Guthrie Streets, Patrolman Medley noticed a commotion in the crowd across the street and persons pointing and calling across the street directing attention to the sign being held by the plaintiff, Marjorie Glasson.

Patrolman Medley, after reading the sign, crossed the street and after a discussion with Sgt. Johnson concerning the contents of the message, it was determined by them that the message was inflamatory and it was creating rancor

and resentment in the crowd which could impede the progress of the motorcade and jeopardize the safety of the President, other members of the motorcade and the onlookers in the crowd.

Sgt. Johnson directed Patrolman Medley to go to the plaintiff and ask her to take the sign down, and, if she would not voluntarily do so, he was to take it from her which would eliminate the hazard. Patrolman Medley approached the plaintiff and asked her to take the sign down and, upon her refusal to do so, he took it from her and destroyed it.

CONCLUSIONS OF LAW

The Court has jurisdiction of the parties and the subject matter of this action; i.e., 42 U.S.C. 1983 and 1985.

As to the 42 U.S.C. 1983 claim, the defendants Johnson and Medley acted in good faith and upon reasonable grounds, and their decision and action in removing the sign from the plaintiff and destroying it were within the ambit of permissible discretion as it appeared at the time. *Pierson* v. *Ray*, 386 U. S. 547; *Notaras* v. *Ramon*, 383 F. 2d 403.

As to the 42 U.S.C. 1985 claim, we find no evidence of "class based invidious discriminatory animus" as required to be an element in *Griffin* v. *Breckenridge*, 403 U. S. 88.

The plaintiff shall take nothing by the complaint, and the defendants shall have judgment for their costs and disbursements herein expended, and judgment shall be entered accordingly.

March 28, 1973

(s) James F. Gordon
United States District Judge

Copies to:
Counsel of record.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1509

MARJORIE GLASSON - - - - *Plaintiff-Appellant*

v.

CITY OF LOUISVILLE, FRANK W. BURKE, GEORGE BURTON, COL. C. J. HYDE, LT. ELMER JOHNSON, PATROLMAN WALTER MEDLEY - *Defendants-Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, DIVISION

Decided and Filed June 13, 1975.

Before: PHILLIPS, Chief Judge, McCREE, Circuit Judge, and McALLISTER, Senior Circuit Judge.

McCREE, Circuit Judge. On July 14, 1970, in Louisville, Kentucky, a police officer forcibly took a poster from a young woman peacefully standing on a public sidewalk and destroyed it. Although not every encounter between a citizen and a policeman warrants extended judicial scrutiny and review, the implications of this apparently inconsequential incident raise important questions about the constitutional guaranty of freedom of expression, and require

us to determine the circumstances in which police officers may be required to respond in damages in an action brought under the Civil Rights Acts, 42 U.S.C. §§ 1983, 1985(3), for abridgement of rights guaranteed by the First and Fourteenth Amendments.[1]

The district court, sitting without a jury, determined, after trial, that appellant could not recover damages under section 1983 because the police had acted reasonably in destroying her poster and that she could not recover damages under section 1985(3) because she had failed to prove that the destruction of her poster was motivated by an impermissible discriminatory animus. We reverse.

On July 14, 1970, the former President of the United States, Richard M. Nixon, was scheduled to ride in a motorcade in Louisville, Kentucky, before attending the Appalachian Governors' Conference. In anticipation of this procession, appellant Glasson, a young Caucasian woman, had prepared to display to the President a poster on which she had printed, "Lead us to hate and kill poverty, disease and ignorance, not each other." By displaying this poster, she hoped to express to the President and to asyone else who might read it, her concern about the divisive issues of American racism and the Vietnam War, and her wish that the President would channel the energies of his administration to heal the divisions created by these issues, and to eliminate poverty, disease, and ignorance. These problems were on the agenda of the Governors' Conference.

Early that morning, Louisville police officers to whom had been assigned the duty of safeguarding the President during the motorcade by monitoring the crowd and keeping it orderly, were given their general orders of the day by Lt. Colonel Edgar Mulligan, Assistant Chief of Police of

[1] In the brief that appellant submitted to this court she conceded that she had no claim against the City of Louisville and stated that she did not wish to pursue her claims against Frank W. Burke and George Burton.

Louisville. Appellee Colonel Hyde, the Chief of Police, was also present. Appellees Johnson and Medley, police officers with approximately 25 years of experience, attended the meeting and were instructed to destroy any sign or poster that was "detrimental" or "injurious" to the President of the United States.

Both Johnson and Medley had previously received instruction in crowd control methods and in handling demonstrations and protests against important public officials. According to Chief of Police Hyde, "we always planned in generalities to use whatever force was necessary [to preserve peace] and have faith in the people . . . assigned out there to exercise their best judgment based upon their training . . . that [they] heretofore had had regarding crowd control." Individuals were to be permitted to demonstrate peacefully "[a]s long as they didn't incite others that might cause trouble . . . ." Should other persons be incited or provoked by a sign, police officers were directed to take whatever action was necessary, including the use of force to maintain or restore order.

It is undisputed that on the day in question, appellant Glasson was standing peacefully against a building holding her sign as she awaited the motorcade. Several other persons were also displaying signs and posters, all of which bore salutations like "Welcome to the President." According to Johnson and Medley, a group of persons located across the street from Glasson noticed her poster and were provoked by it into grumbling and muttering threats. Officer Medley testified that this group was "hollering" and that his attention was drawn by this boisterous conduct to appellant's poster on which, he testified, was printed in large letters "Murderer, teach us to hate and kill" and then in smaller letters "Poverty, ignorance and so forth", a message that he determined was detrimental to the President.[2] He

[2]The district court made no finding that the poster contained the epithet, "Murderer," even though Officers Medley and Johnson testified that it did and Miss Glasson testified that it did not.

then conferred with Officer Johnson and informed him that the poster was "pretty bad because the crowd across the street is going to go over and get her—maybe hurt her." Officer Johnson agreed that the poster was detrimental to the President and directed Medley to follow the general orders given that day—to destroy all signs detrimental to the President. Officer Medley then approached appellant and, according to his testimony, asked her "Would you please take this sign down Lady; it's detrimental to the United States of America." When Miss Glasson refused, and replied that she had a right to display it, Medley took it from her and tore it up. The hecklers across the street cheered and then immediately quieted down and began to disperse.

At trial, Johnson and Medley testified that the boisterous group that had spurred them into action consisted of twenty-five to thirty persons and that there were approximately seven to twelve police officers stationed on the block where the demonstrators stood. When asked whether the police force at hand was sufficient to handle a possible disorder in a crowd that size, Officer Johnson responded that the answer depended upon the number of people who became involved, but that "if it got so bad that we had to have reinforcements we could have done that also." Moreover, even though Johnson testified that the disturbance "was reaching the stage of a riot," the record shows that not one heckler crossed, or even attempted to cross the street, no reinforcements were ever summoned, and the secret service, the federal agency assigned the duty of safeguarding the President, 18 U.S.C. § 3056, was not alerted. Neither officer told the crowd to quiet down or attempted to calm its members except to assure them that the police would take care of appellant's poster. When Officer Medley was asked what he would have done had members of the boisterous group begun to cross the street, he replied, and Johnson agreed,

that no crime would have been committed had they crossed the street and taken appellant's poster because it was "inflammatory anyway." A permissible sign, according to Medley, was "[a]ny sign welcoming the President," and, he observed, that he saw "no other signs with . . . derogatory remarks about the President . . . ." When Johnson was asked, "If there were a group of school children holding a sign saying Welcome, President Nixon, and twenty-five or thirty people across the street were booing them and saying that they didn't like President Nixon and they were going over to get that sign, would you take that sign away from those school children, he replied, "No." He qualified this answer later in his testimony when he stated that he would not have taken it unless "trouble engulfed or started or was created."

Appellant and a law professor who was standing across the street from her near the crowd, both testified that they heard no boisterous heckling but that, on the contrary, because the motorcade had been delayed, the crowd had become subdued and bored at the time Medley grabbed the poster. They also testified that the reaction of the crowd to the police officer's action against appellant was mixed—some persons applauded and cheered while other persons booed and hissed.

Miss Glasson testified that this was the first time that she had ever engaged in a political demonstration; that she was shocked and frightened by Officer Medley's conduct; and that since that time she has been fearful of participating in any other demonstrations.

As a result of this encounter, she filed this action in the United States District Court for the Western District of Kentucky under sections 1983 and 1985(3) of the Civil Rights Acts, 42 U.S.C. §§ 1983, 1985(3). Her complaint charged that Officers Johnson and Medley, acting under color of law, deprived her of rights guaranteed by the First

and Fourteenth Amendments to the United States Constitution, and that they, acting with appellee Hyde, conspired to deprive her of the equal protection of the laws and of equal privileges and immunities under the laws of the United States. She requested compensatory and punitive damages.

The district court, after trial without a jury, made the following findings of fact: (1) that before the President's motorcade had arrived, a group of persons became angered by the message on appellant's poster and began "pointing and calling across the street . . ."; (2) that Officers Johnson and Medley determined "that the message was inflammatory and [that] it was creating rancor and resentment in the crowd which could impede the progress of the motorcade and jeopardize the safety of the President, other members of the motorcade and the onlookers in the crowd;" and (3) that Officer Medley asked appellant to take her poster down and then took it away from her and destroyed it when she refused to comply with his request. The district court determined, as a matter of law, that Officers Medley and Johnson had not violated section 1983 of the Civil Rights Acts because they "acted in good faith and upon reasonable grounds, and their decision and action in removing the sign from the plaintiff and destroying it were within the ambit of permissible discretion as it appeared at the time," citing *Pierson* v. *Ray*, 386 U. S. 547 (1967), and *Notaras* v. *Ramon*, 383 F. 2d 403 (9th Cir. 1967). It also concluded, citing *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), that none of the three appellees had violated section 1985(3) of the Civil Rights Act because there was "no evidence" that their action was motivated by a " 'class-based invidious discriminatory animus.' "

On appeal it is contended that the district court erred in holding that the officers acted reasonably and in good faith in seizing and destroying appellant's poster, and in determining that there was no evidence of an impermissible in-

vidious discriminatory animus. We agree and reverse. Although generally findings of fact by a trial court must be accepted by an appellate court unless they are clearly erroneous, F.R. Civ. P. 52(b), determinations, whether called ultimate findings or conclusions of law, that attach legal significance to historical facts may be reversed if upon examination of the record they are found to be erroneous. *E.g., United States* v. *Weingarden,* 473 F. 2d 454, 460 (6th Cir. 1973), *Guzick* v. *Drebus,* 431 F. 2d 594, 599 (6th Cir. 1970), *cert. denied,* 401 U. S. 948 (1971), *Ashland Oil & Refining Co.* v. *Kenny Construction Co.,* 395 F. 2d 683, 684 (6th Cir. 1968), *Cordovan Associates, Inc.* v. *Dayton Rubber Co.,* 290 F. 2d 858, 859 (6th Cir. 1961). *See Edwards* v. *South Carolina,* 372 U. S. 229, 235 (1963). We hold that when Officer Medley destroyed Miss Glasson's poster, she was engaged in activity protected by the First and Fourteenth Amendments; that his action, directed by Officer Johnson and authorized by Chief of Police Hyde, was unreasonable and not taken in good faith; and that it violated her constitutional rights and was actionable under section 1983 of the Civil Rights Acts. Moreover, since appellees agreed to destroy all placards that were critical of the President and offensive to the community, the destruction of the poster was pursuant to an impermissibly invidious discrimination remediable under section 1985(3) of the Civil Rights Acts.

No state may agreeably to the Constitution intercept a message and remove it from the channels of communication or punish its dissemination solely because of its content unless it is obscene, *e.g., Miller* v. *California,* 413 U.S. 15 (1973), *Roth* v. *United States,* 354 U.S. 476 (1957), defamatory, *e.g., New York Times* v. *Sullivan,* 376 U.S. 254 (1964), constitutes "fighting words," *e.g., Lewis* v. *City of New Orleans,* 415 U.S. 130 (1974), *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), or substantially and directly imperils

national security, *see New York Times Co.* v. *United States,* 403 U.S. 713 (1971). Moreover, the Constituttion protects not only the substance of an expression but also the use of words selected for their emotive quality even though they may offend the tastes of the community. *E.g., Papish* v. *Board of Curators of the University of Missouri,* 410 U.S. 667 (1973), *Cohen* v. *California,* 403 U.S. 15 (1971), *Thonen* v. *Jenkins,* 491 F. 2d 722 (4th Cir. 1973). Inherent in suppressing the use of particular words is the grave risk of inhibiting the expression of ideas, particularly unpopular ones.

The message that Miss Glasson sought to communicate was an expression of her views about important public questions and policies. This kind of expression is entitled to the greatest constitutional protection. As the Supreme Court stated in *New York Times Co.* v. *Sullivan, supra,* at 269:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Accordingly, even if the appellation "Murderer" appeared on Miss Glasson's placard, and her message was expressly critical of the Nixon administration, it was constitutionally protected. The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is "the central meaning of the First Amendment." *Id.* at 273. *See generally, A. Meiklejohn, Political Freedom: The Constitutional Powers of the People* (1948), Kalven, *The New York Times Case: A Note on "The Cen-*

tral Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191.

Although the content of a communication may be protected, the state may, in some circumstances, regulate the time, place and manner of expressing it. *See, e.g., Grayned* v. *City of Rockford,* 408 U.S. 104, 115-17 (1972). For example, it may determine not to permit two parades to proceed along the same street at the same time, or two rallies to be held simultaneously in the same part of a public park. Moreover, the state may in appropriate circumstances prohibit rallies in jail yards, *Adderley* v. *Florida,* 385 U.S. 39 (1966), in public libraries, *see Brown* v. *Louisiana,* 383 U.S. 131 (1966), and near courthouses, *Cox* v. *Louisiana,* 379 U.S. 559 (1965). *See generally,* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 Sup. Ct. Rev. 1. Yet, at the same time, our public streets and parks

> have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. *CIO,* 309 U.S. 496, 515-16 (1939).

In this case, Miss Glasson was in a place where she had a right to be, at a time that was appropriate, and was conducting herself peacefully and lawfully. She, like many other persons, had taken the opportunity to express her ideas to the President—from a place designated by the state for onlookers and in a manner often used by persons who do not have access to the print or broadcast media.

Moreover, we do not believe that Miss Glasson somehow forfeited the protection afforded her message by the Constitution becaues it unintentionally evoked a hostile reaction from others. We reach this conclusion after considering this case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan, supra,* at 270. The purpose of the First Amendment is to encourage discussion, and it is intended to protect the expression of unpopular as well as popular ideas. Accordingly, hostile public reaction does not cause the forfeiture of the constitutional protection afforded a speaker's message so long as the speaker does not go beyond mere persuasion and advocacy of ideas and attempts to incite to riot. *See, e.g., Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969); *Ashton* v. *Kentucky.* 384 U. S. 195 (1966); *Edwards* v. *South Carolina, supra; Feiner* v. *New York,* 340 U.S. 315, 321 (1951).[3]

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[3]Feiner used a loudspeaker to address an interracial crowd of seventy-five to eighty persons and urged them to attend a meeting to discuss racial discrimination. During the course of his exhortation, he made derogatory remarks about President Truman, the Marshall Plan, and local officials, and urged the Negroes in the crowd to "rise up in arms" against white people and "fight for equal rights." The crowd blocked sidewalks, forcing pedestrians to walk in the street, and became angry and threatened to attack Feiner if the police failed to act. The police requested Feiner to stop speaking three times before arresting him for disorderly con-

(Footnote continued on following page)

To permit police officers to prohibit the expression of ideas which they believe to be "detrimental" or "injurious" to the President of the United States or to punish for incitement or breach of the peace the peaceful communication of such messages because other prsons ar provoked and seek to take violent action against the speaker would subvert the First Amendment, and would incorporate into that constitutional guarantee a "heckler's veto"[4] which would empower an audience to cut off the expression of a speaker with whom it disagreed. The state may not rely on community hostility and threats of violence to justify censorship.

The record before us demonstrates that Miss Glasson, in displaying her placard which contained a constitutionally protected message, in a peaceful manner, from an appropriate place, was engaged in activity protected by the First Amendment and that its destruction by Louisville police officers Johnson and Medley deprived her of that right. She thus made out a prima facie case for damages under section 1983. This section of the Civil Rights Act provides, in relevant part:

> Every person who, under color of any statute, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or

duct. In upholding the conviction, the Supreme Court determined that the police "in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions." *Id.* at 319.

For over twenty years the Supreme Court has confined the rule in *Feiner* to a situation where the speaker in urging his opinion upon an audience intends to incite it to take action that the state has a right to prevent.

[4]For a discussion of the concept of a "heckler's veto", *see generally*, H. Kalven, The Negro and the First Amendment, 140-60 (1966).

> immunities secured by the Constitution and the laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute imposes on the states and their agents certain obligations and responsibilities. A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect from violence persons exercising their constitutional rights. *E.g., Sellers* v. *Johnson,* 163 F. 2d 877 (8th Cir. 1947), *Cottonreader* v. *Johnson,* 252 F. Supp. 492 (M.D. Ala. 1966). And, in the absence of a speaker's exhortation to violence in carefully defined circumstances, "state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights." *Smith* v. *Ross,* 482 F. 2d 33, 37 (6th Cir. 1973). *Accord, e.g., Gregory* v. *Chicago,* 394 U.S. 111, 119 (1969) (Black, J. concurring) and cases cited therein.[5]

[5]In *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), for example, a speaker, whose ideas had caused a violent reaction from some members of his audience, was convicted of violating an ordinance that prohibited any activity that " 'stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.' " *Id.* at 3. In reversing the conviction, the Court observed that ". . . a function of free speech under our system of government is to invite dispute. It may indeed serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 4.

In view of this high purpose of the First Amendment, the Supreme Court has become increasingly reluctant to affirm convictions of speakers for disorderly conduct or breach of the peace when their expression of ideas protected by the First Amendment has unintentionally provoked reaction from a hostile crowd. *E.g., Street* v. *New York,* 394 U. S. 576 (1969); *Gregory* v. *Chicago, supra; Cox* v. *New Hampshire,* 379 U. S. 536, 559 (1965); *Edwards* v. *South Carolina, supra; Niemotko* v. *Maryland,* 340 U. S. 268,

(Footnote continued on following page.)

The duty of police officers to protect persons exercising the constitutional right of expression is illustrated by the case of *Cottonreader* v. *Johnson, supra.* In that case, the court, on behalf of demonstrators for racial equality, issued an injunction that ordered police officers to protect them from violent actions threatened by persons opposed to their cause. In explaining the basis for its order, the court observed that the police officers had stood by idly while hostile whites attacked the demonstrators and that they had engaged in acts of brutality themselves. It determined that the police officers had failed o discharge the duties the law imposed on them by "failing to maintain and keep order, generally, when these marches and protests were taking place," and it rejected "the claim that they did not have an adequate police force to cope with such situations" when this claim was "made without any effort on the part of the

273-89 (1951) (Frankfurter, J. conc.); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940).

In *Street,* the Supreme Court, in reversing a conviction for burning an American flag and for publicly speaking contemptuous words about it, stated:

> Nor could such a conviction be justified on the second ground mentioned above: the possible tendency of appellant's words to provoke violent retaliation. Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 574 (1942). . . .
>
> Again, such a conviction could not be sustained on the ground that appellant's words were likely to shock passers-by. Except perhaps for appellant's incidental use of the word "damn," upon which no emphasis was placed at trial, any shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. [Citations omitted].

394 U. S. at 592.

defendants to seek and obtain assistance from other authorities." 252 F. Supp. at 496. The court concluded that

> [u]nder such circumstances suppression by public officials or police of the rights of free speech and assembly cannot be made an easy substitute for the performance of their duty to maintain order by taking such steps as may be reasonably necessary and feasible to protect peaceable, orderly speakers, marchers or demonstrators in the exercise of their rights against violent or disorderly retaliation or attack at the hands of those who may disagree and object.

Id. at 497.

If this were a case requiring us to review a criminal conviction of Miss Glasson for displaying her sign or to review the denial of an injunction prohibiting appellees from engaging in activity like that challenged here (assuming that the other prerequisites for injunctive relief were satisfied), our inquiry would be ended. *See, e.g., Gregory* v. *Chicago, supra.* In this appeal, however, we review not a criminal conviction nor a denial of injunctive relief, but a civil action for damages based upon state deprivation of constitutional rights by means short of an arrest.

In determining the circumstances under which a police officer must respond in damages for the tortious interference with a person's right to express ideas, we do not write upon a blank slate. *In Pierson* v. *Ray,* 386 U. S. 547 (1967), the Supreme Court announced that reasonableness and good faith was an affirmative defense to an action brought under 42 U.S.C. § 1983. The Court recognized that police officers acting in good faith should be accorded an area of discretion when their actions are the subject of a suit for damages for unlawful or wrongful conduct ostensibly within the scope of their duties. And, when a police officer is accused of false

arrest, "good faith and probable cause" affords a defense to a section 1983 action brought against him. *Id.* at 557. *See also Scheuer* v. *Rhodes,* 416 U.S. 232 (1974).

This affirmative defense was recently reconsidered by the Supreme Court in *Wood* v. *Strickland,* 43 U.S.L.W. 4293 (February 25, 1975), an action brought by high school students who claimed that they had been suspended from school in violation of their constitutional rights and sought appropriate damages. In its discussion of the affrmative defense available to the school board members who had ordered the suspension, the Court stated:

> The official must himself be acting sincerely and with a belief that he is doing right, but *an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law* on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to *a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.* Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should

> have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. (Emphasis supplied.)

Id. at 4298.

Although only *Pierson* specifically concerns the liability of police officers for invasion of constitutional rights, both *Scheuer* v. *Rhodes* and *Wood* v. *Strickland* are helpful in determining the conditions under which an affirmative defense of reasonableness and good faith has been established. From an examination of all three cases, we conclude that the factors to be considered in determining whether the defense has been established are whether the police officers knew or should have known that the complainant was engaged in the exercise of constitutionally protected activity, and if they knew (or should have known), whether they acted out of an honest and reasonable belief that their interference with the exercise of those rights was required to avoid imminent and serious injury to persons or property. Every asserted justification must be considered carefully on a case by case basis, and due regard must be given to the fact that the officers may be acting in the urgency of a street confrontation and not in the contemplative atmosphere of judicial chambers.

These factors, in one form or another, have been considered by federal courts for a number of years in cases in which police officers who suppressed the peaceful expression of ideas have been asked to respond in damages to the speaker. In *Downie* v. *Powers,* 193 F. 2d 760 (10th Cir. 1951), a group of Jehovah's Witnesses were attacked by a mob, and police officers, although aware of threats of violence, did nothing to prevent the formation of the mob or

to restore order after violence broke out. In holding that because of a procedural error the members of this sect were entitled to a new trial of their action against the officers for damages brought under section 1983, the court stated:

> One charged with the duty of keeping the peace cannot be an innocent bystander where the constitutionally protected rights of persons are being invaded. He must stand on the side of law and order or be counted among the mob. [Citations omitted]. But the officials are the keepers, not the insurers of the peace in the community. Diligent and conscientious effort is all that is required. Otherwise, officers would be civilly and criminally liable under Federal law for every breach of a constitutionally protected right of a citizen—a result which the framers of the Civil Rights Act never intended.

Id. at 764.

Other courts have recognized a defense of reasonableness and good faith to actions brought for damages under section 1983 even when the justification asserted for the challenged police behavior was security of the President. *E.g., Scherer* v. *Brennan,* 379 F. 2d 609 (7th Cir.), *cert. denied,* 389 U.S. 1021 (1967); *Butler* v. *United States,* 365 F. Supp. 1035 (D. Haw. 1973); *Sparrow* v. *Goodman,* 361 F. Supp. 566 (W.D.N.C. 1973), *aff'd sub nom. Rowley* v. *McMillan,* 502 F. 2d 1326 (4th Cir. 1974). In *Scherer* the court affirmed a determination that Secret Service agents were not required to respond in damages for trespass and for interfering with a plaintiff's use of his home, when the home in which he kept military rifles, rounds of ammunition, and cannon capable of penetrating a concrete wall was located within three hundred yards of an inn where the President was staying. Although this case was decided before the Supreme Court decision in *Pierson,* the court took into account the fact that plaintiff had previously been arrested for illegal possession of a dangerous weapon, a cannon, and that the agents' action was reasonably related to their statutory duty of protecting the President. The facts of that case are, of course, a far cry from those before us in which there is no suggestion that Miss Glasson herself posed any threat to the safety of the President.

In *Butler, supra,* the court refused to grant defendants' motion to dismiss or for summary judgment in an action for damages brought under section 1983 against military security personnel. Plaintiffs had been excluded from a public reception for the President, and were detained for fingerprinting, photographing and other purposes because they wished to express peacefully their opposition to the President's policies and to his reelection. In ordering the case to be tried, the court observed, and we agree, that "[w]here the occasion for exercising First Amendment rights has passed, a private action for damages affords the only practicable means of redressing the wrong alleged." *Id.* at 1040. "But," the court stated, "a law enforcement officer may allege and prove in defense his subjective good faith belief that his conduct was lawful and the objective reasonableness of this belief under the circumstances." *Id.* at 1045.

Finally, in *Sparrow* v. *Goodman, supra,* plaintiffs, who were excluded from a public gathering at which the President appeared, brought an action for injunctive relief and for damages for false arrest and assault under section 1983. The court ordered the case for damages to be set for trial and observed that the evidence adduced at the hearing in connection with the issuance of an injunction indicated that plaintiffs had been excluded solely because they had opposed, or because their appearance had suggested that they opposed, the President. The court determined that the rea-

son for exclusiou was plaintiffs' political beliefs, and that there was no evidence to suggest that plaintiffs presented a threat to the President's safety. Moreover, in rejecting the asserted justification of presidential security, the court stated that it was unwilling to assume, without proof, that the asserted justification was valid. 361 F. Supp. at 586.

Ideally, police officers will always protect to the extent of their ability the rights of persons to engage in First Amendment activity. Yet, the law does not expect or require them to defend the right of a speaker to address a hostile audience, however large and intemperate, when to do so would unreasonably subject them to violent retaliation and physical injury. In such circumstances, they may discharge their duty of preserving the peace by intercepting his message or by removing the speaker for his own protection without having to respond in damages. Accordingly, whether a police officer must respond in damages for his actions is judged by whether his conduct was reasonable, considering all the circumstances, and by whether he acted in good faith. A police officer's stated good faith belief in the necessity or wisdom of his action is not dispositive of that element of the defense, but must be supported by objective evidence. *See, e.g., Pierson* v. *Ray, supra; Monroe* v. *Pape,* 365 U.S. 167 (1961); *Scott* v. *Vandiver,* 476 F. 2d 238 (4th Cir. 1973); *Rodriguez* v. *Jones,* 473 F. 2d 599 (5th Cir. 1973); *Dowsey* v. *Wilkins,* 467 F. 2d 1022 (5th Cir. 1972). To hold that a police officer is exonerated from liability if he merely acts in subjective good faith might foster ignorance of the law or, at least, encourage feigned ignorance of the law. This we are unwilling to do. The law does not expect police officers to be sophisticated constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law, it is not unreasonable to expect them to have some knowledge of it. We cannot permit a police officer to avoid liability for damages by

pleading ignorance of the law when he unreasonably or in bad faith oversteps the bounds of his authority and invades the constitutional rights of others. At the same time, courts should not "second guess" police officers who are often required to assess a potentially dangerous situation and respond to it without studied reflection. Thus, even though a police officer may not have chosen the wisest or most reasonable course of action, he will not be civilly liable if his conduct is based on a reasonable and good faith belief that it was necessary under the circumstances. *See, e.g., Smith* v. *Ross,* 482 F. 2d 33, 37 (6th Cir. 1973), where this court stated, in affirming the dismissal of a complaint in a section 1983 action after trial, "We do not condone the actions of the deputy, who would have served his office more honorably by unequivocally protecting appellants regardless of the local unpopularity his actions might have evoked."

In examining whether appellees Johnson and Medley acted in good faith and whether their asserted belief that their actions were necessary to protect the President was reasonable under the circumstances, it is "our duty . . . to make an independent examination of the whole record." *Edwards* v. *South Carolina, supra,* at 235. There is no evidence that Miss Glasson's placard posed any threat to the safety of the President, to his motorcade, or to onlookers. If any danger to public order existed, it was posed by the persons who were offended by her message. Yet, these persons were located across the street from appellant, were only twenty-five to thirty in number, and never even stepped off the curb on their side of the street in the direction of Miss Glasson. In addition, there were approximately eight to twelve police officers on duty in close approximation to this moderately sized crowd and, although Johnson testified that he was not sure whether this force would have been adequate to maintain order, he also testified that reinforcements could have been obtained rapidly had that been neces-

sary. Although Officers Medley and Johnson characterized the hecklers as "near to riot", at no time did they admonish the crowd, call for reinforcements, or even alert the Secret Service despite the claimed danger to the President. Moreover, the disturbance did not attract the attention of any other police officers stationed nearby. These circumstances, taken together, demonstrate that their asserted belief that the destruction of appellant's poster was necessary to presidential security and to public order was not reasonable.

Our examination of the record also convinces us that the destruction of appellant's poster was not done in good faith. The general order of the day was to destroy all posters "detrimental" or "injurious" to the President. When Officer Medley first noticed Miss Glasson's poster he determined that it was detrimental to the President, a judgment in which Officer Johnson concurred before ordering its destruction. When Officer Medley took the poster from Miss Glasson he informed her that the reason for his action was that the poster was "detrimental to the United States," not that she, the President, or any other person was endangered by it. Both officers testified that only posters favorable to the President were permissible. Moreover, Officer Johnson unequivocally testified that had this same crowd under the same circumstances been outraged by a poster favorable to the President he would not have ordered its destruction. Although he later qualified his answer, his testimony still demonstrates that a different standard would have been applied had the crowd been provoked by a poster favorable to the President. The actions of Officers Medley and Johnson were the result of an official determination not to permit dissent and of their failure to accord to appellant the right to engage in activity protected by the First Amendment. Also, they failed to recognize her right to be protected from criminal assault and battery. They testified that they had no obligation to protect appellant, and that

had any member of the crowd proceeded against her they would not have arrested the aggressor because in their judgment appellant's poster was "inflammatory." The actions and attitudes of appellees Medley and Johnson thus bespeak a callous disregard of Miss Glasson's right to express and to advocate peacefully her ideas and exhibit shocking disregard of her right to have her person and property protected by the state from violence at the hands of persons in disagreement with her ideas. *Compare, Gregory* v. *Chicago, supra.*

Accordingly, we hold that these police officers are required to respond in damages under section 1983 of the Civil Rights Act because they suppressed appellant's peaceful communication of ideas protected by the First Amendment. When other persons became hostile because of disagreement with the content of her communication, the police officers were not authorized to suppress the offending speech. They may not defend against a section 1983 action on the ground that her message "could impede the progress of the motorcade and jeopardize the safety of the President, other members of the motorcade and the onlookers in the crowd," when they made no attempt to calm the crowd whose unruliness was limited to muttering threats unaccompanied by action; when they admit that they, either alone or with available reinforcements, could have handled a potential disturbance; when they did not contact the Secret Service or call for reinforcements; and when they admit that had the same crowd been provoked by a poster favorable to the President, they would not have destroyed it.

We also determine, after a careful examination of the entire record, that Miss Glasson's poster was taken from her pursuant to a "class-based invidiously discriminatory animus," *Griffin* v. *Breckenridge,* 403 U. S. 88, 102 (1972) and that, unless there exists some other basis for excusing appellees Hyde, Johnson and Medley, appellant proved a

violation of section 1985(3) of the Civil Rights Act, 42 U.S.C. § 1985(3). Section 1985(3) provides in relevant part:

> If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The United States Supreme Court, in a recent interpretation of this statute, stated: "The language requiring intent to deprive a person of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise, class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge, supra* at 102. Although the Court, in that case, refused to decide whether discrimination based on a criterion other than race would be sufficient to establish a cause of action under the Act, its earlier decisions have suggested that this is so. *E.g., Snowden* v. *Hughes,* 321 U. S. 1 (1944). Accordingly, this court, in construing the statute, has held that the statutory language does not require that the discrimination be based on race. *E.g., Cameron* v. *Brock,* 473 F. 2d 608 (6th Cir. 1973); *Azar* v. *Conley,* 456 F. 2d 1382 (6th Cir. 1972). *Accord, e.g., Richardson* v. *Miller,* 446 F. 2d 1247 (3d. Cir. 1971). In the *Cameron* case, we affirmed a judgment for plaintiffs in an action brought by a supporter of an incumbent sheriff's opponent who was arrested while distributing campaign leaflets and who charged that his arrest was a part of a conspiracy to deprive him and other supporters of the sheriff's opponent of the equal protection of the laws. In

affirming, we held "that § 1985(3)'s protection reaches clearly defined classes, such as supporters of a political candidate. If a plaintiff can show that he was denied the protection of the law because of the class of which he was a member, he has an actionable claim under § 1985(3)." 473 F. 2d at 610.

In the case before us, the district court found that the action of the police officers was not based upon an invidious criterion. Whether that conclusion is one of fact, or law, or mixed, makes no difference because we hold that the conclusion was not merely wrong but clearly erroneous. The record shows indisputably that the Louisville police officers established as a guideline for monitoring the crowd during the President's motorcade an invidious discrimination between persons displaying posters or signs critical of the President and those with posters or signs favorable to him. First, during the general orders on the morning of July 14, Chief of Police Hyde was present when Officers Medley and Johnson were instructed to destroy any sign "detrimental" or "injurious" to the President. When Officer Medley's attention was attracted to appellant's poster he determined that it was detrimental, and Johnson agreed, referring to the general orders of the day. Although there was some conversation between Johnson and Medley concerning the opposition of some members of the crowd to the poster, the record discloses that this consideration was only a minor factor in their decision to proceed against Miss Glasson. At the time of the unrest, it is undisputed that neither Johnson nor Medley did anything to calm the crowd except to express assurances that they would accede to and carry out its wishes. Moreover, when Officer Medley destroyed appellant's poster, his justification expressed to her was not that her personal safety or that of the President was endangered but that her message was detrimental to the President or to the United States.

At trial, when Officer Medley was asked what kind of poster would have been permissible that day, he replied that only those that had "Welcome President Nixon" or similar messages would have been permitted. When Officer Johnson was asked whether he would have ordered the destruction of a poster favorable to the President, he answered, "No." Moreover, both officers testified that they had no obligation to protect Miss Glasson in the event the crowd assaulted her because her poster was "inflammatory."

The record is thus unmistakably clear that appellees intended to permit no criticism of the President that day. A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine. Appellees drew a line that was not merely invidious but one that also struck at the very heart of the protection afforded all persons by the First and Fourteenth Amendments. *See, New York Times, Inc.* v. *Sullivan, supra.*

We hold that the district court erred in entering a judgment for appellees in the section 1983 action on the grounds that Officers Johnson and Medley acted reasonably and in good faith in destroying appellant's poster and in the section 1985(3) action on the ground that appellant had failed to prove that the destruction of her poster resulted from an invidiously discriminatory animus. Accordingly, we reverse and remand for further proceedings consistent with this opinion and for a determination of the damages Miss Glasson sustained. In so doing, we observe that appellant may recover not only for out-of-pocket expenses but also for emotional and mental distress. *Donovan* v. *Reinbold*, 433 F. 2d 738 (9th Cir. 1970).

Reversed and remanded.

CERTIFICATE OF SERVICE

I, Martin R. Glenn, one of the attorneys for Petitioners, acting on behalf of all counsel for all Petitioners, and being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of September, 1975, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on Marjorie Glasson, Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid to his respective attorneys of record, as follows:

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